IN THE

United States

Court of Appeals

For the Ninth Circuit

No. 17,057

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

KIT MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This proceeding is before the court on the petition of the National Labor Relations Board, hereinafter called the Board, for enforcement of its order against Kit Manufacturing Company, hereinafter called the Respondent.

The complaint giving rise to this proceeding was filed by the Board through the Regional Director for the Nineteenth Region on August 24, 1959. (R. 3 G. C.'s Ex. 1-V) Said complaint alleges that Respondent had engaged, and was engaging, in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 29 U. S. C. A. Sec. 141 et seq.), hereinafter called the Act. Following the issuance of the complaint, a hearing was held before a Trial Examiner whose Intermediate Report and Recommended Order was issued on the 6th day of January, 1960. (R. 11) Timely exceptions to said Intermediate Report were filed with the Board by Respondent. The Board thereafter adopted the findings, conclusions and recommendations of the Trial Examiner. (R. 45)

It was found by the Trial Examiner and the Board that the Respondent had violated Section 8(a) (3) and (1) of the Act by discharging the employee Elsworth Jordon because of his union membership and activities. The Trial Examiner and the Board also rejected Respondent's contention that Elsworth Jordon was discharged for insubordination and leaving a job unfinished without permission on the day the discharge took place.

SUMMARY OF ARGUMENT

The Trial Examiner's Intermediate Report is filled with many findings of fact wholly unsupported by evidence rendering any legal conclusions drawn

therefrom completely improper and incorrect.

Jordan was hired as a maintenance man under rather unusual circumstances. He agreed with the company to refrain from union activities inasmuch as they would interfere with the proper performance of his duties. This arrangement was of his own choice and it appears to have been entered into voluntarily. (R 61)

The record shows that Jordan was inefficient and unable to perform the skilled duties usually imposed upon a maintenance man. It is generally accepted that a maintenance man must be qualified to do a number of different jobs in the plant involving electricity, plumbing, carpentry, etc. (R 104 to 109 Inc.)

The testimony of the plant superintendent Skinner shows that Jordan was given a long trial period and many opportunities to qualify as a maintenance man as appears from the testimony of Skinner on page 104 of the printed record:

> "A. * * * we like to give an employee ample opportunity to prove his ability to do the work that he's supposed to do and we don't take action; don't have action too hastily because there's operations there in the plant that need to be done and it takes some time for an employee to work through the various stages of the job, and I, for one, certainly like to give the employee the benefit of the doubt and not make decisions too hastily as to his ability to do the job.

Q. Did you give him an opportunity to work?

A. I feel we gave him ample opportunity, yes."

It should be born in mind that the training of a maintenance man takes considerable time as this employee's work requires an accurate knowledge of many job classifications, including plumbing, electricity, machine work, etc. We believe it would be helpful to point out to the court the different rules violated by Jordon to give an idea of his inefficiency, his mental attitude and his inability to qualify as a maintenance man. We also call attention to the fact that when he finally severed his connection with the company, it was more or less at his own insistance and according to the undisputed testimony, had he shown the proper attitude, he would have been offered a different job. (R 107, 121, 122, 123, 131) Insubordination shown when he refused to sign correction notice card (R 109)

The record shows that Jordan was guilty of the following infractions of the rules:

1. He was continually late for work and took many half days off. (R. 105)

2. Violation of company rules such as lack of interest in the work, unqualified to perform the duties, being absent and late, etc. (R. 107)

3. Insubordination, refusal to sign a report upon request. (R. 108)

4. Loitering and smoking in the rest room which was near the timeclock, making it possible for the employee to check out first or ahead of time,

refusing to follow and heed warnings on this violation. (R. 108). The superintendent testified that the warning notice is not prepared unless it is a second or third violation. (R. 108, 109)

5. Complete lack of knowledge of electricity, claiming that he couldn't work on electric wires for some time after the switch was broken because the electricity hadn't drained out of the line. (R. 103)

6. Numerous complaints from other foremen. (R. 103)

7. Deliberately leaving his job on a Saturday afternoon when he was specifically instructed to complete certain work necessary to Monday's operation. (R 117)

The Trial Examiner seems to be confused on the evidence as to the final act of insubordination on the part of Jordon. The record shows that Jordon was accountable to the superintendent, Skinner, which is the normal relationship in the case of maintenance men. The record shows further that on the date in question, Jordon had no permission from Skinner to leave the premises although there is some vague reference in the record to the fact that he had permission from some subordinate individual working on the same shift.

There is also some confusion as to what transpired on the day Mr. Jordon's services were terminated. According to Skinner, Jordon came to the plant with a newspaper clipping and asked, "Does this mean I'm terminated?" and Skinner replied that he had not written any termination

notice on him but was looking for another maintenance man and Jordon replied, "Well, that means I'm fired." and Skinner replied, "Well, if that's the way you want to put it, that's the way it is." Skinner further testified that he hadn't intended to discharge Jordon but was going to transfer him to another job, but because of Jordon's belligerent attitude and conclusion that he was terminated, Skinner changed his mind and let Jordon quit. (R.111)

The testimony of Skinner as to Jordon's refusal to work and his insubordination is corroborated by Foreman Brown who testified that Jordon refused to complete the job assigned to him on the Saturday before his discharge. (R 123) Brown testified that he was in charge on that particular morning and that when he came back Jordon was gone. Since Jordon was required to report either to Skinner or Brown and reported to neither one, it is quite clear that he left without proper authority and refused to complete his work. This is also supported by the statement by Jordon, himself, that he was not feeling well on the morning in question as he had been out to a party the night before. Jordon testified that he explained his difficulties to someone at the plant but not Brown or Skinner and that he took off before the work was finished. On page 127 of the printed record, Jordon seems to be confused as to why he left early. In one answer he states that he told Brown that he was not feeling well and that he asked if he could go home and Brown was

purported to have said O.K., but in another place he claims the work was finished. However, both Brown and Skinner testify that they had to stay and finish the job themselves.

We find the Trial Examiner in error in his conclusion in the paragraph between lines 30 and 45 on page 11 of his Intermediate Report (R. 31) wherein he claims that Skinner admitted that Jordon's superior had notified him, Skinner, that Jordon would be absent. We further object to the Trial Examiner's supporting his findings from evidence not in the record such as the affidavit of Skinner submitted to the Board. We do not believe any such affidavit was ever received.

This is the usual case of where the Trial Examiner automatically and systematically rules out the evidence from the Respondent's witnesses while accepting the evidence of appellants. However, we fail to see how, in the face of the record of this man's numerous violations, his inability to perform his duties and his deliberate insubordination, anyone can justify the conclusions arrived at by the Trial Examiner.

ARGUMENT

The resoning in the recent Birmingham Publishing Co. case, 262 F.2d 2, should point to the solution for the Board. The statement by the Court in that case is truly significant and we quote:

"III. This court has held that 'the burden is on the Board to prove and not on the employer to

disprove the presence of anti-Union animus or other prohibited discriminatory motivations in hiring and firing'. We cannot say that the Board has met the burden of proof that Edwards' discharge was 'discriminatorily motivated' or that the Board's finding of unlawful motivation is supported by substantial evidence. On this phase of the case we are in agreement with Member Jenkins, dissenting member of the Board.

"If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union. We have no doubt that the Birmingham Publishing Company was glad to get rid of Edwards. But the Company has a right to operate its plant efficiently. If an employee is both inefficient and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge. We cannot say, and the evidence does not support the conclusion that the Board can say: Edwards was fired because the Company's officials had an anti-Union animus against Edwards."

The Decision in the above case is the culmination of a number of previous cases beginning with NLRB vs. Tex-O-Kan Flour Mills Co., 122 F.2d 433, down through NLRB vs. Fulton Bag & Cotton Mills, 175 F.2d 675, NLRB vs. Ray Smih Transport Co., 193 F.2d 142, and NLRB vs. Denton, 217 F.2d 567.

The question of whether or not the employer was guilty of a violation of 8(a)(3) and (1) of the Act

by interfering with or coercing employees in the exercise of their right to organize or to form, join or assist any labor organization, can be answered briefly in this way. The employer, as represented by Skinner, was very frank, candid and honest. He in all instances stated his own personal opinion of the company to pay additional wages or operate under more expensive conditions. On this point we refer to the printed record starting on page 99 wherein we find Skinner frankly and honestly stating his difficulties in operating the plant and we quote:

> "A. I was referring that a plant such as this . . . I had certain amount of dollars and cents to put in this plant to get it into production and that's all that I had to make this plant a paying proposition in order to keep the employees employed at the rate of pay they're making, and it was at the extreme end that I could afford to pay at that time and I might have mentioned that under no Union organization could I afford to pay any more money and couldn't until the plant had a better foundation to stand on, and I asked the employees that I had to give management a chance and give us a little more time before they got into something that might be of serious consequences."

Skinner was not opposed to unions but felt that under the present operating budget he could not afford any increases. Skinner's attitude is also shown on page 99 of the printed record wherein he told the employees to all vote and to vote for their

choice of either management or union to represent them, but he did frankly state he felt that *at this time* management could do more for them than the union. In explaining this, he went on to say that he had a certain amount of dollars to put into the plant and that was all.

With reference to the insurance, Skinner testified, and it is not disputed, that it was absolutely necessary to get the insurance into effect immediately and that he had specific instructions by teletype from California to have the cards returned by the following Monday. (R. 100)

The Respondent has consistently asserted the position throughout these proceedings that Jordon was discharged because of his leaving work without the permission of the production manager. It is uniformly recognized that the discharge of an employee for such an offense is not violative of of the Section 8(a)(3) and (1) of the Act. While the Act does protect employees from discrimination because of Union activity, a discharge for a legitimate reason does not fall within the statutory prohibitions.

NLRB vs. Blue Bell (5th Cir., 1955), 219 F.2d 796;

NLRB vs. Hibriten Chair Co., Inc. (4th Cir., 1952) 197 F.2d 1021;

NLRB vs. Superior Co. (6th Cir., 1952), 199 F.2d 39.

In proceedings under Section 8(a)(3) and (1) of the Act involving alleged descriminatory conduct

on the part of an employer, the employer's motivation in taking the action complained of is a most significant factor. This principle has been recognized by this Court in NLRB vs. Kaiser Aluminum & Chem. Corp. (9th Cir., 1954), 217 F.2d 366, where it was said:

> "The charge of the complaint is that these three particular discharges were discriminatory. Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized * * *.' The General Counsel had the burden of the issue."
>
> NLRB vs. Kaiser Aluminum & Chem. Corp., 217 F.2d 366, 368.

See also:

> NLRB vs. Adkins Transfer Co., (6th Cir., 1955), 266 F.2d 324;
>
> NLRB vs. McGahey (5th Cir., 1956), 233 F.2d 406.

The Courts unanimously hold that where the discharge was pursuant to the good faith belief on the part of the employer that the activities engaged in were not protected by the Act. In this case, it appears that several other employees were discharged during the same period and under similar circumstances, and the Trial Examiner did not find such other charges to be contrary to the Act. The discharge of an employee under such circumstances has been held to lack the necessary unlawful motivation and would therefore not be in

violation of the Act. In other words, the company had a number of inefficient employees, and it was necessary to discharge these employees from time to time to build up a proper crew in a new industry. The timing of the discharges over a period of 30 to 40 days was such as to show that it was simply a weeding out of inefficient employees. One discharge was in no different circumstances than another. The motivation of the employer is the crucial element in determining a violation. The record shows no different motivation towards Jordon than the others. It was simply a case of giving an employee all of the chances possible for him to succeed and the employee failing to take advantage of his opportunities by, among other infractions, deliberately walking off the job leaving the work to be performed by the plant superintendent and the foreman.

It would seem, therefore, that Skinner in all instances was merely giving his opinion; he was making no threats or promises and he sincerely felt that the company could do more for the employees than the union and he expressed this opinon along with the suggestion that they all vote and that they vote for either the union or management, whichever way they felt was best.

CONCLUSION

Under these circumstances, we fail to find any evidence of an interference with the union's activities. We feel that the General Counsel has failed to

carry the burden or to prove by substantial evidence that the dischage was not for cause.

DATED: February 3, 1961.

Respectfully submitted,

ELI A. WESTON,

Attorney for Respondent.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, et seq.), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: